ORIGINAL

EX PARTE OR LATE FILED

Wiley, Rein & Fielding

1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Jeffrey S. Linder
(202) 719-7384
jlinder@wrf.com

Fax: (202) 719-7049
www.wrf.com

May 25, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Office of the Secretary
445-12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

Re: *Ex Parte* Communication, CC Docket No. 96-98

Dear Ms. Salas:

Attached please find a letter that was sent to Ms. Dorothy Attwood, Chief of the Common Carrier Bureau, today. I would appreciate it if you would include a copy of the letter in the record for CC Docket No. 96-98. If you have any questions, please let me know.

Respectfully yours,

Jeffrey S. Linder by

Jeffrey S. Linder

cc: Glenn Reynolds
Michelle Carey
Jodie Donovan-May
Kyle Dixon
Jordan Goldstein
Sam Feder
Sarah Whitesell
Janice Myles

Gary Phillips
Edward Shakin
Jonathan Banks
Michael Pryor
Jake Jennings

Wiley, Rein & Fielding

1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Jeffrey S. Linder
(202) 719-7384
jlinder@wrf.com

Fax: (202) 719-7049
www.wrf.com

May 25, 2001

BY HAND

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Joint Petition of BellSouth, SBC, and Verizon to Eliminate Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98

Dear Ms. Attwood:

As counsel for BellSouth Corporation, SBC Communications, Inc., and the Verizon Telephone Companies (the "Joint Petitioners"), I am writing regarding NewSouth's May 21, 2001 letter to you.[1] That letter "responds to" arguments made in our Opposition to NewSouth's motion to dismiss the Joint Petition.[2] It is both untimely and, like the motion to dismiss, substantively baseless.

Under Section 1.45(c) of the Commission's Rules, any reply to our Opposition was due no later than May 15.[3] NewSouth's failure to comply with that requirement cannot be excused by calling the letter an *ex parte* rather than a reply; whatever its label, the letter undeniably is intended to be a reply. NewSouth's disregard for the Commission's procedural requirements not only

---

[1] Letter from Michael H. Pryor, counsel for NewSouth Communications, to Dorothy Attwood, Chief, Common Carrier Bureau, dated May 21, 2001, at 1 ("Pryor Letter").

[2] *See* Pryor Letter at 1.

[3] That rule section requires replies to be filed within 5 days after the time to file oppositions has filed. Even allowing three days for service by mail, NewSouth's reply should have been filed by May 15.

improper, but also ironic, given its mistaken assertion that the Joint Petition is procedurally defective.

In any event, NewSouth fails to present any substantive basis for dismissal of the Joint Petition.

First, NewSouth reiterates its claim that the UNE Remand Order precluded petitions to remove elements from the national "list" for a three-year "quiet period." As our Opposition explained, that Order did no such thing. NewSouth's reply fails to address, let alone rebut, our showing that the Joint Petition does not implicate the concerns expressed in the UNE Remand Order. Likewise, the reply reads too narrowly the Commission's recognition that it could not predict when market and technological changes would eliminate the legal basis for mandating unbundling. *See* UNE Remand Order, ¶ 152. While that recognition was expressed in the context of declining to set a firm sunset date for the UNE rules, the Commission's reasoning is just as forceful in demonstrating that setting the UNE list in stone for three years would be arbitrary.

Second, not only is NewSouth wrong in asserting that the Commission froze the UNE list, but it is entirely off-base in repeating its claim that such a "quiet period" would not violate the Act. The Act mandates unbundling only where the Section 251(d)(2) impair standard is met. Prolonging unbundling obligations when that standard no longer is met is an indisputable violation of Congress's language and intent.

It is no answer, as NewSouth contends, to point to the Commission's discretion to structure its processes to promote administrative efficiency. In so arguing, NewSouth relies on an entirely inapposite Supreme Court case, *FCC v. Schreiber.*[4] The *Schreiber* decision concerned an unrelated issue – whether the Commission had authority to promulgate procedural standards for determining whether testimony taken and documents produced during an investigation should be accorded confidential treatment. The Court held only that the Commission had such authority, pointing to the language of Section 4(j). The *Schreiber* decision therefore stands for the unremarkable proposition that an administrative agency generally can establish policies to govern the conduct of its proceedings. It does not allow an agency to run roughshod over the substantive requirements of a statute – such as by continuing to require unbundling well after the statutory standard for such a mandate is no longer satisfied.

[4] Pryor Letter at 2, citing FCC v. Schreiber, 381 U.S. 279 (1965).

In fact, the weight of authority is squarely to the contrary. It is black letter administrative law that an agency cannot "sidestep a reexamination of particular regulations" when the basis for the rule no longer exists. *See Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979). And, it is equally well-established that the general provisions of Section 4 of the Act "merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute." They do not "confer[] additional substantive authority on the FCC."[5] The Commission cannot accept NewSouth's invitation to turn a blind eye to evidence demonstrating that there is no impairment with respect to high-capacity loops and dedicated transport.

Third, contrary to NewSouth's claim (Pryor Letter at 2-3), there is an evident connection between the matters presented in the Joint Petition and the Commission's consideration of whether carriers should be permitted to convert special access circuits into combinations of UNEs. As we explained in our Opposition, the Commission cannot rationally authorize such conversions if (as is demonstrably true) high-capacity loops and/or dedicated transport do not meet the impair standard.[6] NewSouth ignores this fundamental point.

Fourth, NewSouth has it exactly backwards when it warns the Commission that granting the Petition would undermine investment expectations. Pryor Letter at 3. The Commission, economists, and Wall Street all have recognized that continuing to mandate access to UNEs where the impairment standard is not met would artificially suppress, not promote, investment and innovation. Moreover, granting the Joint Petition will create a more stable environment for competitors with sound, facilities-based business plans and strong management teams, not harm them. Those carriers have suffered from "guilt by association" as Wall Street retrenched from the flood of capital that previously was made available to companies that had no viable long-term strategy and survived only by exploiting short-term arbitrage opportunities (such as excessive unbundling). Eliminating

---

[5] *See* Iowa Util. Bd. v. FCC, 120 F.3d 753, 795 (8th Cir. 1997), *rev'd in part on other grounds*, AT&T v. Iowa Util. Bd., 119 S. Ct. 719 (1999) (discussing sections 4(i) and 303(r); *see also* California v. FCC, 905 F.2d 1217, 1241(9th Cir. 1990).

[6] In any event, as demonstrated in the Petitioners' filings in the conversion proceeding, there is no basis for permitting such conversions even if high-capacity loops and dedicated transport continued to meet the impairment standard, which they do not.

excessive unbundling requirements will send a strong message that carriers that are competing successfully are doing so on the merits, not on the basis of unsustainable arbitrage.[7]

Finally, NewSouth continues to claim that the Joint Petition must be dismissed because it was not styled as a Petition for Rulemaking. Notably, however, NewSouth, does not endeavor to rebut our showing that the Joint Petition satisfies the requirements for a Petition for Rulemaking, even after conceding that we made that argument in our Opposition. Therefore, the only real dispute is over the type of process that the Commission should initiate in response to the Petition – a one-step proceeding, under which the Commission acts based on the record to be compiled next month, or a two-step approach, under which the Commission first issues a Notice of Proposed Rulemaking. We explained in our Opposition that there are compelling reasons for the Commission to act in a single step; NewSouth simply disagrees with that position. It has not presented any basis for dismissing the Joint Petition.

The Commission should deny NewSouth's motion to dismiss and grant the relief sought in the Joint Petition promptly upon conclusion of the comment cycle.

Respectfully yours,

Jeffrey S. Linder

Jeffrey S. Linder

cc: Glenn Reynolds
Michelle Carey
Jodie Donovan-May
Kyle Dixon
Jordan Goldstein

---

[7] Chairman Powell has acknowledged that the Commission has focused too much in the past on promoting entry by as many CLECs as possible at the expense of fostering lasting, facilities-based competition. *See* "Powell Blames CLEC Market Woes on Lenders, Bad Business Plans," *Communications Daily*, May 23, 2001, at 4.

Sam Feder
Sarah Whitesell
Janice Myles
Gary Phillips
Edward Shakin
Jonathan Banks
Michael Pryor
Jake Jennings